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No. 84-356

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE TRAVELERS INSURANCE COMPANY,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS

On Appeal From The Supreme Judicial Court
For The Commonwealth Of Massachusetts

REPLY BRIEF FOR APPELLANT

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ARGUMENT

1. The Rule of *Oliver* and *Alessi* Requires Preemption of Section 47B

a. Statement of the rule

The Commonwealth distorts the holding of *Oliver*[1] and ignores the holding of *Alessi*[2] on the issue of NLRA preemption. The two errors are linked: *Alessi* refutes the Commonwealth's reading of *Oliver*; thus the Commonwealth must ignore *Alessi* to persist in its reading of *Oliver*.

[1] *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959).

[2] *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

The Commonwealth reads *Oliver* to hold, only, that the states may not interfere with the *process* of collective bargaining by prohibiting the use of that process to establish wages, hours, and working conditions. Commonwealth's Brief at 42. According to the Commonwealth, *Oliver* did not preclude direct state regulation of the substantive terms and conditions of employment; under *Oliver* the states may regulate any subject of collective bargaining, through laws of general applicability, so long as they do not discriminate against the method of collective bargaining.

The Commonwealth's restrictive interpretation of *Oliver* has no basis whatever in the reasoning or language of this Court's opinion. As Professor Cox has noted: "The reasoning of the opinion in *Teamster's Union* v. *Oliver* is totally opposed to the suggestion" that the case is restricted to state regulation of the process of collective bargaining; "[t]he court's language is manifestly inconsistent with" that restriction. A. Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L.J. 277, 298 (1980).

The restriction urged by the Commonwealth has no place in *Oliver*. In concluding that the Ohio antitrust law could not apply to the minimum rental provisions of the collective bargaining agreement at issue in *Oliver*, this Court reasoned:

1. The rental provisions had the purpose and effect of protecting the negotiated wage scale; hence the provisions were a mandatory subject of bargaining under the *NLRA*. 358 U.S. at 293-95.

2. "If there is to be [a] limitation on the arrangements that unions and employers may make with regard to [mandatory] subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartly Acts, it is for Congress, not the states, to provide it." *Id.* at 297.

3. "The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several states." *Id.* at 296.

4. Therefore, "there is no room...for the application...of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Id.*

The rule which emerges from *Oliver* is, plainly, this: The states may not limit "the solutions that the parties' agreement can provide" to mandatory subjects of bargaining unless the state limitation is "one of a sort which Congress has indicated" the states may impose. The rule is not restricted to state laws which discriminate against the collective bargaining process, as *Alessi* made abundantly clear.

The New Jersey workers' compensation statute at issue in *Alessi* did *not* single out collective bargaining or labor unions for special treatment; it did *not* prohibit the use of collective bargaining as a method of establishing pension benefits; it applied to all employees' pension plans regardless of the means by which they were established. In short, the New Jersey statute was a paradigm of a law of "general applicability," which neither upset the balance of power between labor and management nor focused exclusively or principally on the collective bargaining process. Still, the state statute was pre-empted by the NLRA by virtue of the general rule pre-empting state regulation of collective bargaining." *Alessi*, 451 U.S. at 526, n.23. In so holding, this Court cited *Oliver*, saying:

> Where, as here, the pension plans emerge from collective bargaining, the...federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate pension terms.... As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring pre-emption of intrusive state law.

Id. at 525-26 (citations and footnotes omitted). The holding of *Alessi*, and its reliance on *Oliver*, refute the Commonwealth's reading of *Oliver* and the narrow view of NLRA preemption which that reading reflects.

b. Foundation for the rule in federal labor policy

The Commonwealth states: "Congress' concern in developing federal labor law policy is and always has been with the *process* of establishing the terms and conditions of employment, not in prohibiting state prescriptions of such terms." Commonwealth's Brief at 40-41 (emphasis in original). That statement of congressional intent is flatly inconsistent not only with *Oliver* and *Alessi*, but also with cases decided by this Court under the Railway Labor Act (45 U.S.C. § 151 *et seq.*) and Section 301 of the Labor Management Relations Act (29 U.S.C. § 185).

California v. *Taylor*, 353 U.S. 553 (1957), held that the Railway Labor Act preempts application of California's civil service laws to the labor relations of the Belt Railroad, a state instrumentality. The state laws ***both*** precluded collective bargaining ***and*** specified virtually all of the substantive terms and conditions of public employment. *Id.* at 555. The state laws were held preempted by federal labor law not only insofar as they precluded collective bargaining, but also insofar as they limited the results that might ensue from collective bargaining. In terms that later echoed in *Oliver* and *Alessi*, the Court said:

> Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer, but the terms of the collective bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws.

353 U.S. at 561. Federal labor policy thus protects from state interference not only the process of collective bargaining, but also the product—the substantive terms and conditions of

employment embodied in a labor agreement. The freedom to bargain collectively must include the freedom to effectuate the terms of the resulting agreement; that is the clear import of *Taylor*, as well as of *Oliver* and *Alessi*.

Federal protection of the product of collective bargaining from state interference extends to the point of prohibiting the states from applying state laws to the interpretation and enforcement of collective bargaining agreements. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). Section 301 of the Labor Management Relations Act "expresses a federal policy that federal courts should enforce [collective bargaining] agreements" and that "the substantive law to apply is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957). As this Court said in *Lucas Flour*: "With due regard to the many factors which bear upon competing state and federal interests in this area . . ., we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." 369 U.S. at 104 (citations omitted).

The application of state laws to the interpretation and enforcement of collective bargaining agreements threatens to import state policies into an area in which Congress has acted to leave the parties free from state regulation. Therefore, through Section 301, "Congress has provided for a system of federal law applicable to the agreement the parties [make] in response to [the] duty [to bargain collectively], *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448." *Oliver*, 358 U.S. at 296. Unless "[t]he solution worked out by the parties [is] one of a sort which Congress has indicated may be left to prohibition by the several states," then "there is no room . . . for the application here of [a] state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Id.*

Machinists[3] and its progeny establish the rule that the states may not regulate *conduct* that Congress intended to leave unregulated. *Oliver* and *Alessi* establish the rule that the states may not regulate *content* that Congress intended to leave unregulated. The two rules are merely two aspects of a unitary federal policy: To encourage collective bargaining, Congress insulated from state regulation a range of tactics for use in the process of collective bargaining, and a range of "solutions that the parties' agreement can provide to the problems of wages and working conditions." *Oliver*, 358 U.S. at 296. The freedom conferred by federal law to "order[ ] and adjust[ ] competing interests through a process of free and voluntary collective bargaining" (*Lucas Flour*, 369 U.S. at 104) includes *both* the freedom to employ bargaining tactics permitted by Congress, *and* the freedom to effectuate an agreement on wages and working conditions within the range of solutions permitted by Congress. *See California* v. *Taylor*, 353 U.S. at 561.

Machinists, *Oliver* and *Alessi* protect from state regulation matters of collective bargaining that Congress intended to leave unregulated. Preemption under the reasoning of these cases admits of no exception: If Congress intended the matter to be unregulated, then state regulation necessarily "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

c. Scope of permissible state regulation under the rule

The Commonwealth attempts to support an unduly narrow reading of *Oliver* by suggesting that any broader reading would lead to the absurd result that federal labor law preempts such traditional state legislation as minimum wage laws, child labor laws, occupational health and safety laws,

[3] *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

unemployment compensation laws, and workers' compensation laws. Commonwealth's Brief at 39 and 45. The suggestion has no merit; *Oliver* itself provides the answer.

Oliver carves out two areas in which the states are free to regulate the substantive terms of collective bargaining agreements:[4] The states may regulate those subjects of collective bargaining "which Congress has indicated may be left to [regulation] by the several states," 358 U.S. at 296; and the states may regulate "a subject matter that the parties [are] under no obligation to discuss." *Id.* at 295.

When Congress has seen a need for state regulation of a mandatory subject of bargaining, then Congress has authorized state regulation of the subject, within limits set by Congress. Thus the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) expressly authorizes state laws that require a higher minimum wage, a shorter maximum workweek, and greater protection for child labor than the federal law itself requires:

> No provision of this Act or any order thereunder shall excuse noncompliance with any...State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any...State law or municipal ordinance establishing a higher standard than the standard established under this Act.

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[4] *Oliver* also suggested that a "local health or safety regulation" might take precedence over a conflicting provision of a federally-sanctioned collective bargaining agreement. 358 U.S. at 297. Federal law now expressly authorizes the states to adopt occupational health and safety standards to supplement federal standards. *See* discussion of OSHA, *infra*. If "local health or safety regulation" was meant to encompass the kind of regulation now authorized expressly by OSHA, which is suggested by the Court's earlier reference in *Oliver* to *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1942) (*see* 358 U.S. at 295), then local health or safety regulations are not an independent category of permissible state regulations; they fall within the category of regulations authorized by federal law.

29 U.S.C. § 218(a). In equally unmistakable terms, the Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*) expressly authorizes the states to regulate safety in the workplace, within bounds set by Congress: "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect," 29 U.S.C. § 667(a); and the states may promulgate their own safety standards on issues covered by federal standards as long as the state standards are "at least as effective in providing safe and healthful employment and places of employment as the [federal] standards." 29 U.S.C. § 667(c)(2). Similarly, both Title VII (42 U.S.C. § 2000e *et seq.*) and the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*) affirmatively encourage state efforts to enforce federal and state prohibitions against discrimination in employment. Title VII provides:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

42 U.S.C. § 2000e-7. The ADEA has uniformly been construed to authorize analogous state regulation in the area of age discrimination in employment. *See, e.g., Simpson* v. *Alaska State Commission for Human Rights*, 608 F.2d 1171 (9th Cir. 1979); *Hillman* v. *Consumers Power Co.*, 90 Mich. 627, 282 N.W.2d 422 (1979).

Federal law not only authorizes the establishment of state systems of unemployment compensation, but also actively encourages their establishment through the provision of federal funds:

> Title IX of the Social Security Act of 1935 established the participatory federal unemployment compensation scheme. The statute authorizes the provision of federal funds to States having programs approved by the Secretary of Labor.... The voluminous history of the Social Security Act [makes] it abundantly clear that Congress intended the several States to have broad freedom in setting up the types of unemployment compensation that they wish.

New York Telephone Co. v. *New York State Department of Labor*, 440 U.S. 519, 536-37 (1979). The evidence of congressional intent to authorize state systems of workers' compensation is no less compelling. Beginning in 1917, Congress twice enacted legislation incorporating as federal maritime law "the rights and remedies under the Workmen's Compensation Law of any state." Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634. When this Court invalidated both acts as unconstitutional delegations of exclusively federal maritime jurisdiction (*Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924)), Congress enacted the Longshoremen's and Harbor Workers' Act (33 U.S.C. § 901 *et seq.*), which was modelled on the New York workers' compensation law. *See* Larson, WORKMEN'S COMPENSATION LAW §§ 89.00-89.23 (1984). Further, federal job training programs under the Comprehensive Employment and Training Act (29 U.S.C. § 801 *et seq.*) adopt state workers' compensation systems for program participants. *See, e.g.*, 20 C.F.R. § 676.27 ("Each participant [in specified programs] shall be assured of workers' compensation... at the same level and to the same extent as others similarly employed who are covered by a workers' compensation statute or system") and § 688.23 (same for participants in other CETA programs). Further still, Congress has offset against Social Security disability benefits a portion of amounts received

"under a workmen's compensation law or plan of the United States or a State" (42 U.S.C. § 424a(2)) to avoid "the erosion of the workmen's compensation programs." *Richardson* v. *Belcher*, 404 U.S. 78, 83 (1971). Other evidence of a congressional intent to encourage state workers' compensation systems, within limits set by Congress, is abundant. *See, e.g.*, 4 WORKMEN'S COMPENSATION LAW, *supra*, at §§ 89.00-91.17.

The specter of wholesale federal preemption of state employment law is thus a mirage. *Oliver* and *Alessi* preserve state employment laws authorized by Congress, and Congress has deliberately and selectively authorized the states to regulate those aspects of employment which, in the view of Congress, are best left to regulation by the several states.

Oliver and *Alessi* also preserve state power to regulate "a subject matter that the parties [are] under no obligation to discuss." *Oliver*, 358 U.S. at 295. While the full range of nonmandatory subjects of collective bargaining is not susceptible of categorical enumeration, it is clear that the range is sufficiently broad to serve as a meaningful source of state regulatory authority.[5] It is also clear that *Oliver*'s preservation of state authority to regulate permissive subjects of collective bargaining would save from preemption state insurance regulations which—unlike Section 47B—do *not* "vitally affect" wages, hours and working conditions.

Allied Chemical & Alkali Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), held that "matters involving individuals outside the employment relationship" are mandatory subjects of collective bargaining if, and only if, those matters "vitally affect[ ] the 'terms and conditions of employment' of

[5] The criteria for distinguishing between mandatory and permissive subjects of bargaining, and a fairly comprehensive catalog of the subjects that have been held by the NLRB and the courts to fall into each category, are presented in C. Morris, 1 THE DEVELOPING LABOR LAW (2d ed., Bureau Of National Affairs 1983), in chs. 16 through 18, which is published under the aegis of the Section of Labor and Employment Law of the American Bar Association.

active employees." 404 U.S. at 180.[6] Thus traditional forms of state insurance regulation—such as regulations of the solvency and integrity of insurance companies, the fairness of claims adjustment procedures, and the intelligibility of language used in insurance policies—which directly involve parties outside the employment relationship and have only an attenuated effect on terms and conditions of employment are not preempted because they do not "vitally affect" terms and conditions of employment.

The true rule of *Oliver* and *Alessi* is neither as narrow as the Commonwealth claims nor as broad as the rule which the Commonwealth erroneously ascribes to the appellants' position. It is narrow enough to accommodate many and varied forms of state employment and insurance regulation. But it is, as it must be to effectuate federal labor policy, broad enough to protect free collective bargaining from the imposition of state limits, not authorized by Congress, on "the parties' solutions to the problems of wages and working conditions." *Oliver*, 358 U.S. at 295. It is, therefore, broad enough to preempt Section 47B.

d. Application of the rule to Section 47B

The evidence adduced at trial demonstrated conclusively that mandated benefit statutes such as Section 47B vitally affect both the conduct of collective bargaining and the content of the resulting agreement. *See* Travelers' Brief at 18-24. The Commonwealth does not seriously contest this. Instead, the Commonwealth claims only that Section 47B is "no more" of an interference with collective bargaining than state un-

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[6] *Ford Motor Co.* v. *NLRB*, 441 U.S. 488 (1979), held that the "vitally affects" test does not apply where the third party involved is a supplier of goods or services, if the employer has the right to change suppliers or to supply the goods or services himself. But that holding has no bearing here: A state insurance law affects equally all insurers doing business in the state, and employers (other than insurance companies) cannot themselves supply insurance.

employment compensation and workers' compensation laws. Commonwealth's Brief at 38.[7] But the short and sufficient answer to that claim is that Congress has unmistakably *authorized* state unemployment compensation and workers' compensation systems, and has thereby determined that federal labor policy should permit whatever interference with collective bargaining might ensue, whereas Congress has *not* authorized state mandated benefit statutes such as Section 47B.

The Commonwealth claims to find congressional support for Section 47B in federal statutes encouraging state efforts to prevent mental illness. Commonwealth's Brief at 43-44. But the claim is baseless. The federal statutes cited by the Commonwealth provided—before they were repealed—federal funds for *state-supported* community mental health centers, the very form of state effort which Massachusetts sought to *supplant* by "3rd party payments from insurance companies" through enactment of Section 47B. *See* A. 432-47; Travelers' Brief at 3-4 and 36.

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[7] The Commonwealth also says that Section 47B is no more intrusive on federal labor policy than state laws mandating holidays from work and payment for time spent voting. *Id.* However, the Commonwealth cites no case holding that such state laws are free from NLRA preemption. Indeed, the Commonwealth cites no case dealing with state holidays, and cites one case holding that a state law mandating payment for time spent voting does not violate the due process, equal protection, or contract clauses of the federal constitution. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 (1952). The Commonwealth gives no reason to believe that a federally-sanctioned collective bargaining agreement would not take precedence over these state laws, or even that the state laws themselves prohibit voluntary agreements to "opt out" of their requirements. Further, assuming that the state laws prohibit voluntary agreements to opt out, and assuming further that such laws are free from NLRA preemption, still the Commonwealth gives no reason to believe that the grounds on which those laws are (hypothetically) preserved from NLRA preemption would have any bearing on Section 47B.

In any event, neither law is in fact as harmful to collective bargaining as Section 47B. The law at issue in *Day-Brite Lighting*, for example, required payment of four hours' wages for time spent voting, an amount hardly comparable to the abandonment of all vision and dental benefits forced on the Northern New England Carpenters by the New Hampshire mandated benefit statute. A-76-77; Travelers' Brief at 23.

The Commonwealth also claims to find congressional support for Section 47B in the McCarran-Ferguson Act; but here, too, the Commonwealth fails.

2 . THE McCARRAN-FERGUSON ACT DOES NOT PROTECT SECTION 47B FROM NLRA PREEMPTION

a. The purpose of Section 47B

Travelers argued that Section 2 of McCarran-Ferguson (15 U.S.C. § 1012) protects only state laws enacted for a specific purpose—to wit, the purpose of regulating the business of insurance; Section 47B was not enacted for that purpose; therefore, Section 2 of McCarran-Ferguson does not protect Section 47B. *See* Travelers' Brief at 35-38. The Commonwealth does not adequately address that argument.

The Commonwealth's claim that "the function of § 47B is marked by its singular focus on insurance policies and their market," Commonwealth's Brief at 37, is demonstrably false. By its terms, the state law applies equally to employee welfare *plans* and insurance policies. J.S. App. 88a; Travelers' Brief at 36. Indeed, the purpose of Section 47B is marked by its *dual* focus on plans *and* policies: The statute was intended to mandate *benefits*, whether the benefits were provided directly by plans or indirectly by insurance. The language and legislative history of the statute, as well as the Supreme Judicial Court's interpretation of the statute in its first decision of the instant case and the Commonwealth's repeated characterizations of the statute as a "health regulation," belie the claim that Section 47B was enacted for the purpose of regulating insurance. *See* Travelers' Brief at 36-37; Commonwealth's Brief at 37 ("the purpose of § 47B is to improve the perceived inadequacies of treatment of mental illness in Massachusetts. . . .").

The Commonwealth offers only one reason for enactment of Section 47B that has any relation to insurance, and that reason does *not* justify application of the statute to insurance policies covering collectively bargained plans. The Commonwealth claims that the statute was enacted in part to deal with the problem of "adverse selection." Commonwealth's Brief at 4-5. According to the Commonwealth, the phenomenon of adverse selection makes mental health insurance unavailable to those who want it at prices they can afford. *Id.*

The evidence in this case, and the legislative history of Section 47B, demonstrate that the phenomenon of adverse selection does *not* operate in the area of collective bargaining: There is ample and undisputed proof that before enactment of Section 47B labor and management were able to, and did, purchase exactly the types and amounts of mental health insurance negotiated through collective bargaining. It was the enactment of Section 47B and statutes like it, not adverse selection, which prevented labor and management from effectuating their negotiated objectives.

The GE and GTE plans here in evidence are insured by policies covering various forms of mental health treatment. *See* Travelers' Brief at 18; A. 251-52, 273. The United Auto Workers, Local 770 of the Retail Clerks, and the Group Health Association covering federal employees all purchased mental health insurance, at prices they were willing and able to pay, to cover the benefits agreed upon. A. 430, 433, 434-36. There was no evidence, no indication in the Joint Committee Report on Section 47B, and no finding by the trial court that even remotely suggests that adverse selection prevented labor and management from obtaining exactly the mental health insurance coverage negotiated through collective bargaining.

In the face of uncontroverted and overwhelming evidence to the contrary, the Commonwealth contends that Section 47B *aids* workers who "benefit from the NLRA-protected bargaining process" by assuring them of mental health insurance

benefits. Commonwealth's Brief at 47. In fact, Section 47B harms everyone involved in collective bargaining by displacing a system in which they were able to obtain the insurance benefits they wanted by a system in which they are forced to relinquish benefits they want for benefits that the Commonwealth mandates. *See* Travelers' Brief at 18-24.

As the alignment of *amici* in this case reflects, the purpose and the effect of mandated benefit statutes is to increase the purchase of particular medical and other services while shifting the cost of those services from the state to insurers, and ultimately to employees who do not want or use those services. The states benefit, and the providers of services benefit; but they benefit at the expense of workers whose collective bargaining rights are impaired. Whatever may be said of the wisdom of Section 47B as a piece of social or fiscal legislation, it is *not* legislation *"enacted for the purpose of regulating* the business of *insurance."* 15 U.S.C. § 1012(b). Therefore, it is not within the protection of McCarran-Ferguson.

b. The meaning of Section 4 of the McCarran-Ferguson Act

Travelers argued that even if—contrary to fact—Section 47B were included among the state insurance regulations shielded generally by Section 2(b) of McCarran-Ferguson from federal preemption, nevertheless Section 4 of McCarran-Ferguson (15 U.S.C. § 1014) would cut across Section 2(b) and allow the NLRA to continue to apply to Section 47B with full preemptive effect. Travelers' Brief at 38-45. The Commonwealth distorts that argument almost beyond recognition by ascribing to Travelers the claim that the NLRA "specifically relates to the business of insurance." Commonwealth's Brief at 48. The Commonwealth then labels the distortion "novel," and says that it is not supported by the language of Section 4. *Id.* The distorted claim is indeed novel; it was first articulated by the Commonwealth itself.

The preemptive effect of federal laws which "specifically relate to the business of insurance" is preserved by Section 2(b) of McCarran-Ferguson.[8] Section 4 preserves the preemptive effect of other federal laws, which do not specifically relate to the business of insurance, including the NLRA. Plainly, Section 4 was intended to accomplish for the federal laws it specifies exactly the same result that Section 2(b) accomplished for federal laws which specifically relate to the business of insurance: to preserve in full their preemptive effect over conflicting state laws enacted for the purpose of regulating the business of insurance. *See* Travelers' Brief at 38-45.

The Commonwealth contends that Section 4 means something different from what it says. According to the Commonwealth, Section 4 means that "the labor relations and employment conditions within insurance companies should not be exempt from the applicability of collective bargaining and minium wage and hour laws." Commonwealth's Brief at 50, n.36. The Supreme Judicial Court adopted the same construction; there is no need to repeat here the arguments against it. *See* Travelers' Brief at 41-43. However, the Commonwealth cites a 1965 decision of the Supreme Judicial Court[9] as support for its narrow reading of Section 4, and it is instructive to see how the Commonwealth misreads that decision..

At issue in *John Hancock* was a Massachusetts insurance statute which provided that payment of insurance premiums should be deferred "during the period that [the] insurer's agents are on strike." 349 Mass. at 392-93. John Hancock filed for approval with the Commissioner of Insurance a policy endorsement which did not defer payment of premiums during an agents' strike; accordingly, the Commissioner refused to

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[8] "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any state for the purpose of regulating the business of insurance... *unless such Act specifically relates to the business of insurance*...."
15 U.S.C. § 1012(b)(emphasis added).

[9] *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 308 N.E.2d 516 (1965).

approve it. *Id.* at 392. The company then brought an action for review of the Commissioner's decison, claiming that the state statute was preempted by the NLRA. *Id.* at 397. The Commissioner argued that the state law was saved from preemption by Section 2(b) of the McCarran-Ferguson Act; John Hancock countered that Section 4 of McCarran-Ferguson displaced the protection of Section 2(b). The Supreme Judicial Court entered judgment for John Hancock, relying on Section 4 of McCarran-Ferguson, and said:

> [McCarran-Ferguson] specifically provided that "[n]othing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the [NLRA]. . . ." 59 Stat. 34 (1945), 15 U.S.C. § 1014 (1958). Thus the labor relations of insurance companies are subject to the National Labor Relations Act to the same extent as those of other industries.

349 Mass. at 397-98.

The court in *John Hancock* was not asked, and did not undertake, to define the limits of federal authority reserved in Section 4 of McCarran-Ferguson. The court simply dealt with the particular case before it and ruled that the case came within the scope of that reservation. The court did *not* hold that Section 4 meant only to preserve the applicability of the NLRA to the labor relations of insurance companies; nor did it hold that state insurance laws in conflict with the NLRA are saved from preemption. On the contrary, the court held that by virtue of Section 4 of McCarran-Ferguson a state insurance law in conflict with the NLRA is preempted by the NLRA.

CONCLUSION

The judgment of the Supreme Judicial Court should be reversed.

Respectfully submitted,

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